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No. 89-299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHARLES W. KEMPE, JR. and MICHAEL J. ARNOLD, in their capacity as Joint Liquidators of Mentor Insurance Limited,

Petitioners,

—v.—

OCEAN DRILLING & EXPLORATION COMPANY, et al.,

Respondents,

—and—

PINNACLE REINSURANCE COMPANY LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

Cases: PAGE

Ex Parte Collett, 337 U.S. 55 (1949) 4

Piper Aircraft Co. v. *Reyno*, 454 U.S. 235 (1981)..... 3

Shearson/American Express, Inc. v. *McMahon*, 482 U.S. 220 (1987)..... 5

Transunion v. *PepsiCo, Inc.*, 811 F.2d. 127 (2d Cir. 1987)..... 3

United States v. *National City Lines*, 337 U.S. 78 (1949) 4

United States v. *National City Lines*, 334 U.S. 573 (1948) 4, 5

Constitution and Statutes:

U.S. Constitution, Amendment VII..... 3

28 U.S.C. § 1404(a) (1982)..... 4

RICO Legislative History:

116 Cong. Rec. 35295 (1970)..... 5

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Reply Statement of the Case

1. The Respondents would have this case perceived as one involving a local Bermudian dispute concerning Bermudian companies and Bermudian accountants (Br. at 2).[1] Far from it; the RICO issues in this case are concerned with whether the financial statements of Mentor Insurance Limited ("Mentor"), publicly disseminated throughout the United States via the

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1 References to Respondents' Brief in Opposition to Petition for a Writ of Certiorari will be styled "(Br. at _____)."

United States mails, were intentionally falsified as a result of a scheme formulated in and carried out from Louisiana by Louisiana residents.

Those financial statements were purportedly prepared pursuant to principles and standards promulgated by the American Institute of Certified Public Accountants. For example, Mentor's 1982 and 1983 publicly reported financial results were contained in the Annual Report of Respondent Mentor Holdings Corporation. They were prepared in New Orleans and mailed throughout the United States from New Orleans. They were certified and opined on by the New Orleans office of Peat, Marwick, Mitchell & Co. ("Peat Marwick"). Critical information concerning Mentor's reinsurance transactions was deliberately withheld by the New Orleans based defendants from those New Orleans accountants, as well as Peat Marwick personnel in New York and Bermuda.

2. Respondents point out that Petitioners have brought suit against Peat Marwick in Bermuda (Br. at 3); aside from the fact that the matter is dehors the record, they do not say why that action was instituted. The Petitioners did bring a negligence/malpractice action in New York State Supreme Court against Peat Marwick and its Bermudian affiliate. After the decision of the District Court in this case, the New York Court issued an opinion that the Complaint in that case stated a valid claim against Peat Marwick, that it had personal jurisdiction over Peat Marwick's Bermudian affiliate, but that it would nevertheless dismiss the malpractice lawsuit on the grounds of *forum non conveniens* relying in great part on the decision of the District Court in this case. That decision is now being appealed by the defendants.

Before the New York decision was rendered, the Petitioners were forced to file a precautionary writ against Peat Marwick in the Bermuda Supreme Court to stop the running of the statute of limitations in Bermuda in the event that the New York Court granted the then-requested *forum* dismissal without requiring that defendants waive their limitations defenses in Bermuda. That precautionary writ is the "suit against Peat Marwick in

Bermuda" referred to by the Respondents (Br. at 3). It is completely irrelevant to the issues presented by this Petition.

The Issues Raised are not Matters of Settled Law

(i) The circumstances, if any, under which a District Court has the procedural power to destroy substantive RICO rights is not an issue of settled law. *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981) ("*Piper*"), relied upon by the Respondents (Br. at 8-10) for that proposition, had nothing to do with the issue. *Piper* was a negligence action in federal court solely by virtue of diversity jurisdiction. No federally created cause of action containing a special venue statute (as a matter of right) was involved.

(ii) The fact that there is only one other Circuit case involving *forum non conveniens* and RICO, *Transunion Corp.* v. *PepsiCo, Inc.*, 811 F.2d 127 (2d Cir. 1987), does not reflect the settled nature of the issue (Br. at 11). It demonstrates just the opposite.[2] If anything, the paucity of case law on the issue illustrates the inappropriateness of *forum non conveniens* to RICO actions. The viability of RICO actions depends on the commission of predicate acts which in turn consist of violations of American criminal statutes, federal and state. Since those predicate acts involve violations of American criminal laws, *forum non conveniens* should generally have no application, as it should not have had here.

(iii) By their silence, even the Respondents concede that there are no cases deciding the Constitutional issue of whether a District Court has the discretionary power to destroy a right to a jury trial guaranteed by the Seventh Amendment (Br. at 17-18). *Piper* never addressed the issue. It is hardly a settled issue of law.

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2 As pointed out in the Petition, in *Transunion* RICO was not adequately pled. *Transunion*, 811 F.2d at 129; 640 F. Supp. 1211, 1213-14 (S.D.N.Y. 1986); (Petn. at 7 n.3).

(iv) The fact that Bermuda regulates its insurance companies has no relevance to the issues raised (Br. at 13). If as a Constitutional matter a District Court does not have the discretionary power to destroy substantive RICO claims or the right to a jury trial, the existence of foreign regulation of the plaintiff does not substitute for that lack of power.

The Respondents' argument also focuses on regulation of the wrong party. To the extent that regulation by one particular jurisdiction is relevant in a *forum* analysis, the issue involved is whether there is regulation of the defendant and its wrongful conduct, not regulation of the victim of that conduct. What regulatory interest does a foreign land have as to whether a group of Americans violated American criminal statutes in the United States? When that occurs, the litigation involving these violations should take place in the United States whether or not the victim of that conduct is regulated abroad.

(v) We fail to see what comfort the respondents take from *United States* v. *National City Lines*, 337 U.S. 78 (1949) ("*National City Lines II*") and *Ex Parte Collett*, 337 U.S. 55 (1949) (Br. at 14-15). They merely held that when Congress enacted the then-recent 28 U.S.C. § 1404(a) to the effect that "any civil action" may be transferred to another federal district on grounds of convenience, it meant it. They certainly do not stand for the proposition that federally created causes of action such as RICO may be destroyed by a *forum non conveniens* dismissal in favor of litigation in a foreign country.

(vi) The Respondents' legislative history argument is also misplaced. According to the Respondents, and the Fifth Circuit (Br. at 15-16), the relevant inquiry is whether there is an indication in the legislative history that Congress intended that RICO be immune from the doctrine of *forum non conveniens*. No legislative history of any statute could ever be expected to so provide. According to this Court, the relevant inquiry is a very different one, *i.e.*, whether there is an indication that Congress intended that "the courts would have discretionary power to decline the exercise of jurisdiction conferred." *United States* v.

National City Lines, 334 U.S. 573, 587 (1948) ("*National City Lines I*"). Nothing in the legislative history of RICO reflects such an intention. Thus, for example, when Representative Steiger made the statement quoted by this Court in *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987), that the victims of the proscribed conduct "should at least be given *access* to a legal remedy . . . . It is the intent of this body, I am certain, to see that innocent parties . . . *have a right* to obtain proper redress . . . ." (482 U.S. at 240-41) (emphasis added), he clearly did not contemplate that that *right* could be withdrawn at the procedural discretion of a District Court because of perceived convenience. *See also*, 116 Cong. Rec. 35295 (1970) (Statement of Rep. Poff) ("the committee has provided that private persons injured . . . may recover treble damages in *Federal Courts* . . . .") (emphasis added).

Conclusion

This case raises important federal Constitutional and jurisdictional questions. It squarely focuses on the scope of judicial power to supersede Congressional and Constitutional mandates. Its importance far transcends the interests of these particular litigants, substantial as they are. It should be heard by this Court.

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Respectfully submitted,

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